Supreme Court, U.S.
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No. 91-1559

In The

Supreme Court of the United States

October Term, 1991

GREGORY J. AVERY and KATHLEEN R. AVERY,

Petitioners,

vs.

JEAN O. TURNER, TRUSTEE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent, Jean O. Turner, asserts that the question at issue in this case, to be reviewed by this Court is as follows:

> Whether or not the Chapter 7 Bankruptcy Estate of debtors has a financial interest in a terminated, but unliquidated, law partnership asset, namely contingent fee cases in which work was performed both prior to and subsequently, after the filing of their petition.

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Other Authority Cited:

Countryman, Executory Contracts in Bankruptcy, 57 Minn. L. Rev. 439 (1973) 15

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

In addition to the statutes set forth by petitioner, 11 U.S.C. §§ 365 and 541, this case involves Louisiana Civil Code Articles 2828, 2834, and 2835 and 11 U.S.C. § 542, set forth hereinafter:

Art. 2828. Continuation for liquidation; sole proprietorship

When a partnership terminates, the business of the partnership ends except for purposes of liquidation.

If a partnership terminates because its membership is reduced to one person, that person is not bound to liquidate the partnership and may continue the business as a sole proprietor. If the person elects to continue the business, his former partners are entitled to amounts equal to the value of their shares as of time the partnership terminated, and they have the right to demand security for the payment of partnership debts.

Acts 1980, No. 150, § 1.

Revision Comments—1980

(a) This article provides that when one of the causes of termination occurs, the business of the partnership continues, but only for purposes of liquidation.

(b) The article further provides that when there is only one remaining person, the person may elect to continue the business.

In case the business is continued, former partners may demand security for the payment of the debts of the partnership. Since the withdrawing partners have virile share liability for debts incurred prior to withdrawal, they are accordingly given

rights to demand security for the payment of those debts.

(c) If membership is reduced to one person, the former partners cannot compel liquidation if the sole ground for doing so is that the partnership has terminated because of the reduction; however, if there is some other ground for liquidation, such as the inability of the remaining person to furnish the required security, the remaining person can be forced to liquidate the business.

C.C. art. 2832 et seq.

Art. 2834. Liquidation of the partnership

In the absence of contrary agreement, a partnership is liquidated in the same manner and according to the same rules that govern the liquidation of corporations.

A partnership retains its juridical personality for the purpose of liquidation.

Acts 1980, No. 150, § 1.

Revision Comments—1980

(a) Retaining the juridical personality of the partnership facilitates the process of liquidation and insures that the fiduciary relationship between the partners and the partnership continues until final liquidation. Retaining juridical personality also allows the liquidator to act on behalf of the partnership to recover assets and permits the

creditors to institute proceedings against the partnership itself.

(b) The contract of partnership may provide for the appointment of liquidators and may set the manner and method of liquidation. For example, the partners may appoint one or more partners, one or more third persons, or a combination of partners and third persons, to serve as liquidators. This article applies only in the absence of a pertinent stipulation.

(c) Once a cause of termination occurs, the partnership is required to liquidate, unless it is continued as provided in Articles 2827 and 2828, *supra*. If the partnership does not liquidate after a cause of termination has occurred, any interested party may seek a court order directing liquidation and a judicial appointment of a liquidator. An "interested party" includes a partner, a third party creditor, an heir or assign of a partner, or any one who has a legitimate interest in the liquidation of the partnership. If the interested party has good reason for demanding liquidation, he may force liquidation even in case the partnership or the business has been continued as provided in Articles 2827 and 2828, *supra*.

R.S. 12:53, 12-141 et seq.

Art. 2835. Final liquidation

The liquidation of a partnership is not final until all its assets have been collected and applied to its obligations and its remaining assets, if any,

have been appropriately distributed to the partners.

Acts 1980, No. 150, § 1.

Revision Comments—1980

(a) This article insures that the relationship of partners to the partnership, including their fiduciary relationship, does not end fully until final liquidation has occurred. A partner's obligation to the partnership continues with regard to those matters to be carried out in the liquidation process. This is consistent with the rule that the juridical personality of the partnership continues until final liquidation; consequently there is an attendant fiduciary duty of partners not to interfere with the orderly liquidation of the partnership.

(b) This article confers power and authority on the liquidator to handle the liquidation process until the assets of the partnership have been collected, the obligations of the partnership have been satisfied, and the remaining assets, if any, have been distributed.

C.C. art. 2834.

SECTION 542 (11 U.S.C. § 542)

§ 542. Turnover of property to the estate.

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease

under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option,

and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to to [sic] turn over or disclose such recorded information to the trustee.

STATEMENT OF THE CASE

On May 22, 1985, debtors, Gregory J. and Kathleen R. Avery, filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. Within the schedules of bankruptcy, namely Schedule B-2, Section "u" the debtors listed a one-half (½) interest in Orrill & Avery, law partnership, which interest was valued by the debtors at zero. The duly appointed and qualified trustee commenced investigation, individually and through counsel, as to the value of the debtors' interest in the terminated law partnership, which culminated into an adversary proceeding entitled Complaint for Turnover of Value of Partnership filed on January 12, 1987. On June 5 and August 18, 1989, trial on the merits was held and a judgment was signed on January 29, 1990, by the United States Bankruptcy Court, Eastern District of Louisiana. Thereafter, a notice of appeal was filed by debtors to the United States District Court, as a court of review, which affirmed the judgment, as amended, of the Bankruptcy Court. Debtors filed a new notice of appeal to the United States Court of Appeals, Fifth Circuit, which rendered its decision on the 27th day of November, 1991, reversing the judgments of the United

States District Court and the Bankruptcy Court and remanding the case to the United States Bankruptcy Court for further hearings commensurate with its opinion. Petitions for Rehearing were filed by appellant and appellee, which were denied.

SUMMARY OF ARGUMENT

Respondent submits that the scheduled asset belonging to the bankruptcy estate, which is being requested to be turned over to the trustee for administration and distribution to the creditors, is the residuum of the partnership assets, after all debts have been paid and assets liquidated. Accordingly, your respondent contends that the fees and costs accumulated through the completion of these old partnership contingency fee cases belong to the partnership, subject to any claims by the debtor for services rendered and costs advanced subsequent to the filing of the bankruptcy proceeding. There was no executory contract between the client of the old partnership and the debtor. The contingency fee employment contracts were, at all times, between the client and the old terminated law partnership, Orrill & Avery. Partnerships, such as this law partnership, are separate and distinct legal entities. Although terminated by mutual consent of the partners, state law prescribes that a terminated (dissolved) partnership continues to exist as a juridical personality in order to liquidate its affairs. Accordingly, respondent avers that the issue of acceptance or rejection of non-assumable pre-petition executory contracts is illusionary since the old partnership contingency fee contracts were always the property of the terminated partnership, a non-debtor. In short, the debtor, Gregory J. Avery, in the exercise of his fiduciary obligation to the partnership and for his own possible future financial gain, continued to perform services on old partnership cases. All funds generated through the completion of these contingent fee cases belong to the terminated partnership, subject to a claim of offset for work performed post bankruptcy filing. Alternatively,

respondent avers that the United States Court of Appeals, Fifth Circuit, correctly ruled that although the trustee could not assume the executory contracts (contingency fee contracts), the bankruptcy estate was entitled to the value of the work performed up to the date of filing. That court stated:

> The contingent fee contracts in the case at bar were executory because Avery was required to perform services after the bankruptcy petition was filed. Because the contracts were nonassumable as a matter of law they did not form a part of the bankruptcy estate. *But it does not follow that the contingent fee contracts had no value to the law partnership as of the date Avery filed for Chapter 7 protection. To the contrary, the contracts on cases subsequently settled or successfully litigated did have a value on that date. That value is determinable on a* quantum meruit *basis by measuring the value and worth of the legal services performed both before and after the bankruptcy filing.*

(Emphasis ours.)

Although Avery chose to continue the representation of the old partnership clients, not required as stated by the court, the distinction between an individual debtor's executory contract with a client and a partnership's interest in its executory contracts is valid.

REASONS FOR DENYING THE WRIT

Without contradiction, the listing of an interest in a terminated law partnership is property of the bankruptcy estate. 11 U.S.C. § 541(a). The question of extent and value is governed by state law. *In re Farmer's Market, Inc.*, 752 F.2d 1400 (9th Cir. 1986).

What happens when a partnership, such as here, is terminated by consensual agreement of the partners?

Article 2828 of the Louisiana Civil Code states:

> When a partnership terminates, the business of the partnership ends except for purposes of liquidation.
>
> If a partnership terminates because its membership is reduced to one person, that person is not bound to liquidate the partnership and may continue the business as a sole proprietor. If the person elects to continue the business, his former partners are entitled to amounts equal to the value of their shares as of time the partnership terminated, and they have the right to demand security for the payment of partnership debts.

The purposes of liquidation are further defined in Article 2834 of the Louisiana Civil Code, to-wit:

> In the absence of contrary agreement, a partnership is liquidated in the same manner and according to the same rules that govern the liquidation of corporations.
>
> A partnership retains its juridical personality

for the purpose of liquidation.

The concept of juridical personality of a terminated partnership is not new. Even prior to the effective date of the changes to the partnership articles, Title XI Partnerships, Louisiana Civil Code, effective January 1, 1981, the jurisprudence had established the limbo status of the terminated partnership. In the case of *Edco Properties v. Landry,* 371 So. 2d 1367 (La. App. 3rd Cir. 1979), *writ denied,* 375 So. 2d 945 (1979), a thorough analysis of this principle was discussed. It stated at 1371:

> The Louisiana partnership has long been considered a juridical person for certain purposes. It is possessed of rights and privileges and it is subject to obligations distinct from those of the individuals composing it. The partnership itself may own property, and it stands as the creditor or debtor of its own rights and obligations. *Blanchard v. Cole,* 8 La. 153 (1835); *Dick v. Byrne,* 7 Rob. 465 (1844); *Succession of Pilcher,* 39 La. Ann. 362, 1 So. 929 (1887).
>
> * * *
>
> A partnership may institute suit in its own name to assert its interests in its property, such being a corollary of the well settled rule that both movable and immovable partnership property is owned by the firm itself and not by the individual partners. *Succession of Pilcher,* supra; *Toelke v. Toelke,* 153 La. 697, 96 So. 536 (1923); *Posner v. Little Pine Lumber Co.,* 157 La. 73, 102 So. 16 (La. 1924); *Wolf v. New Orleans Tailor-Made Pants Co.,* 52 La. Ann. 1357, 27 So. 893 (1900); *E.B. Hayes Machinery Co. v. Eastham,* 147 La.

347, 84 So. 898 (1920); *Snyder v. Davidson,* 172 La. 274, 134 So. 89 (1931). The right of the individual partners to property standing in the name of the partnership is no more than a right to an undivided interest in whatever property remains after the partnership is dissolved, its rights and obligations are satisfied, and its unliquidated assets liquidated. In *Posner,* supra, the court stated:

> "On the legal proposition that the debts must be paid before the partners can divide the property, that the assets belong to no partner separately, but are a common stock pledged for the debts of the partnership, see *Ward v. Brandt,* 11 Mart. (O.S.) 331, 13 Am. Dec. 352; *United States v. Baulos,* 5 Mart. (N.S.) 567; *Purdy v. Hood,* 5 Mart. (N.S.) 626; *Claiborne v. Their Creditors,* 18 La. 501; *Mourain v. Delamarre,* 2 La. Ann. 142.
>
> We quote the following from the *Succession of Pilcher,* 39 La.Ann. 362, 1 So. 929.
>
> 'A partnership once formed and put into action becomes, in contemplation of law, a moral being, distinct from the persons who compose it. . . . The partners are not the owners of partnership property. It belongs to the ideal being which has the control and administration thereof to enable it to fulfill its legal duties and obligations. The partners own the residuum.' "

See also, Wolf v. Whitney, 424 So. 2d 300 (La. App. 1st

Cir.), *writ denied,* 428 So. 2d 809 (La. 1989).

Although the debtor, Gregory J. Avery, became an owner in division at the moment of termination, his ownership was only to the residuum of the partnership assets after all debts had been paid and all existing assets (contracts) had been liquidated. Accordingly, since the ex-partners have a fiduciary obligation to the terminated partnership and deemed it beneficial to the partnership clients as well as themselves to liquidate the partnership assets in a program devised by themselves, the funds generated or to be generated from the contractual performance of contracts belonging to the terminated partnership are nevertheless partnership property.[1]

At the moment of consensual termination, this law partnership had contingent fee contracts which it owned. The work performed, prior to termination, was in various stages of completion. The ex-partners, Orrill & Avery, voluntarily maintained these partnership contracts to completion, under a private settlement agreement amongst themselves. These partnership contracts did not evolve into individual professional contracts merely because of the termination of the partnership. In the case of *Roy v. Gravel,* 570 So. 2d 1175 (La. App. 3 Cir. 1990), that court held:

> Exceptors' conclusions are based on a false premise, and that is that the partnership terminated for all purposes on January 19, 1980. As we observed earlier in this opinion, citing and quoting from *Edco Properties v. Landry,* 371 So. 2d 1367, 1373-1374 (La. App. 3rd Cir. 1979), a dissolved partnership maintains a fictional existence until all

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1. *In re Chris J. Roy, A Law Corporation,* 130 B.R. 214 (Bkrtcy. W.D. La. 1991).

> of its affairs are wound up and completed. Accordingly, with respect to every imcomplete case file, which is what this litigation is all about, the partnership GRB is still very much in existence. Nor is it correct to analogize the termination of a partnership to the death of an individul partner. No attorney has died, and the partnership has not died. A partnership retains its juridical personality or "life" for purposes of liquidation.
>
> * * *
>
> The business of GRB was the delivery of legal services. Its contractual relations with its clients did not end or terminate upon termination of the partnership.
>
> * * *
>
> The performance of a contingent fee contract with a client is a business transaction. The contingent fee contracts pending at the time of termination continued to be partnership business after dissolution. These contracts were not, as contended by exceptors, dissolved. This kind of injustice resulting to clients of dissolving partnerships is unthinkable.

The matter, *In re Tonry*, 724 F.2d 467 (5th Cir. 1984), is the cornerstone of this writ. Since a trustee is prohibited from assuming executory contracts which a non-debtor may terminate under applicable state law[2], our able opponent forcefully asserts that the contingent fee cases of the terminated partnership handled

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2. 11 U.S.C. § 365(c).

to completion by the debtor are nonassumable. Alternatively, proponents of this writ argue that the private settlement agreement is an executory contract between the terminated partnership and himself.

First off, the substantive law of the State of Louisiana regarding partnerships, its termination and final liquidation, clearly sets forth that the terminated partnership continues to maintain ownership of its contracts. Accordingly, *vis a vis,* client and partnership contracts, a trustee of a debtor, ex-partner, has not the right or ability to assume, even if permissible, a third party contract of non-debtors. Secondarily, there was no contract between the terminated partnership and the debtor relative to the continued handling of these contingent fee contracts. Because of the debtor's relationship with the terminated partnership, unbeknownst to the partnership client, a private "deal" was confected between the ex-partners for the continued representation of old partnership cases. This subsidiary agreement does not qualify as an executory contract since the non-debtor, ex-partner, has no obligation to perform any services whatsoever on cases assigned to debtor except to receive a portion of the fee and costs collected from the completed services, on behalf of the old partnership client, by the debtor.

Reviewing the definition of executory contracts as expressed by Professor Countryman, he states "an executory contract is one under which the obligation of both the bankrupt and the other party to a contract are so far unperformed that failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, *Executory Contracts in Bankruptcy*, 57 Minn. L. Rev. 439, 460 (1973).

Revisiting the facts of this case, the debtor and his ex-law partner agreed amongst themselves to continue to provide legal representation to those contingent fee contracts assigned to them

on the date of termination. This agreement called for each attorney to provide services and advance costs for which he would receive forty-five percent of the recoverable attorney's fees and costs. However, the other ex-partner attorney has no responsibility for providing services or advancement of funds. The contingent fee cases were completely controlled, managed and completed by the attorney (debtor) assigned from the master list of files. Accordingly, the non-debtor law partner had no responsibilities for performance, only the right to participate in the collection of attorney fees and costs therefrom.

As a last bastion of defense, the equitable solution fashioned by the Court of Appeals, Fifth Circuit, is correct in that the contingent fee contracts had value to the terminated partnership. Even though respondent disagrees with the underlying conclusion relative to the contingent fee contracts belonging to the debtor, the claim of the trustee for the value of debtors' interest in the terminated partnership at the time of filing is separate and distinct. This is especially true of fees and costs received by the debtor on old partnership cases which were exclusively handled by the non-debtor ex-partner. *Quantum meruit* division of attorney fees renders the opportunity for all claimants to present their assessment of work performed, skills employed and the results received.

CONCLUSION

This writ of certiorari filed by petitioners should be denied for the following reasons:

a) The contingency fee contracts owned by the terminated law partnership remained the property of the terminated partnership.

b) The contingency fee contracts of the terminated partnership remained the property of the terminated partnership

until fully liquidated.

c) The contingency fee contracts of the terminated partnership had value as of the time of termination and as of the time of the filing of the petition for relief in bankruptcy, Chapter 7 liquidation, by the debtors, Gregory J. and Kathleen R. Avery.

d) The interest of the debtor in the terminated partnership became property of the bankruptcy estate as of the moment of filing.

e) The value of the debtor's interest in the terminated partnership is the full amount of the assets minus the debts, known as the residuum, to which this debtor would have been entitled to fifty percent.

f) At the moment of filing, the bankruptcy estate became owner of that residuum of the debtor, Gregory J. Avery, subject to any offsetting claims of the debtor in connection with the completion of the contracts under the theory of *quantum meruit*.

g) The trustee of the bankruptcy estate had no executory contract to accept or reject, even if it were assumable, since the executory contract was between two non-debtors, *i.e.* the client and the old terminated partnership.

Respectully submitted,

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